STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 5, 2011
v	No. 298948 Chippewa Circuit Court
KELLY ANN JONES, Defendant-Appellant.	LC No. 09-000092-FC

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendant Kelly Jones pleaded nolo contendere to a count of involuntary manslaughter, MCL 750.321, stemming from the death of her young daughter (the victim) due to a morphine overdose. The trial court sentenced defendant to a term of 10 to 15 years' imprisonment. Defendant appeals by leave granted, and we reverse and remand for resentencing.

I

As defendant entered a plea to involuntary manslaughter, the pertinent underlying facts appear in the preliminary examination transcripts. Michigan State Police Detective William Smith testified about his December 2008 interview of defendant. Defendant initially expressed to Smith her belief that the victim "had gotten a hold of a" morphine pill, which "her mother-in-law Connie Jones" likely had "dropped on the floor." In response to Smith's inquiry whether Jones had given defendant morphine pills, defendant answered with a denial, although defendant later acknowledged that Jones did supply defendant with morphine pills, specifically "two 200 milligram morphine tablets, and three . . . or four . . . thirty . . . milligram morphine pills." According to Smith, defendant theorized that, "if there was a pill dropped and [the victim] got it, it had to have been the smaller ones, being the" 30-milligram tablets, which "looked like a Tic-Tac." Regarding the location of the morphine in defendant's residence, she related to Smith "that the morphine was in a gold pill container," which the victim "must have got ahold [sic] of . . . somehow whether it be on the floor . . . or somewhere low." Defendant "last saw the [victim] alive" around 7:00 in the evening, before they went to sleep together. Defendant explained to

Smith that she suspected the victim might have overdosed on something "when she saw [the victim's] eyes and they were just little slits, and she said that she saw the same thing with her former husband . . . ."[1]

Dr. Benedict Kuslikis, a laboratory director of toxicology, testified that he performed "comprehensive drug screen[s]" on blood and urine samples of the victim retrieved during her autopsy. The victim's blood and urine samples both tested positive for caffeine, "nicotine and metabolite," and, "most alarming[ly]," morphine. Dr. Kuslikis measured in the victim's blood a morphine level of "7,900 nanograms per ml," an amount "off the charts," and "essentially . . . higher than what I've seen with really any . . . reference level . . . that discusses lethality."[2] Dr. Kuslikis also tested for morphine in other anatomic locations within the victim's body, and averred that "all these levels that we have here . . . are all within the lethal range." Dr. Kuslikis opined the victim had ingested "multiple tablets [of morphine] over time," probably 24 to 48 hours before her death.[3]

Dr. Ernest Lykissa recounted at the preliminary examination that he screened a sample of the victim's hair, which yielded "a positive result for morphine of 31,629 picograms . . . per milligram," high above the minimum detectable levels in the test of 200 picograms. Dr. Lykissa interpreted the victim's hair follicle morphine level to reflect that "within the period of three . . . months prior, . . . this two . . . year old child, had received . . . either a repeated extreme dose—by extreme dose I mean over the therapeutic level—of morphine, or one . . . [big dose] injection of morphine that could have resulted . . . [in] demise." In Dr. Lykissa's opinion, "31,629 most probably was accumulative [sic] effect of multiple . . . introductions of morphine into this child prior to its death."

Forensic pathologist Dr. Stephen Cohle confirmed that the victim died from morphine toxicity.[4] When asked to estimate "what the [fatal] dosage might have been," Dr. Cohle explained that he took into account the morphine levels that testing had detected in various parts of the victim's body and "consult[ed] with a medical toxicologist on our staff," before concluding as follows:

> [A]ssuming an equal volume of distribution throughout the body, I got a level, or an amount rather, of 404 milligrams of morphine.

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[1] At some point while seeking assistance for the victim, defendant "had requested Narcan [an overdose counteraction drug] be given to [the victim] when she was taken in the ambulance."

[2] The victim's urine sample contained morphine at a level of "160,000 nanograms per ml."

[3] The preliminary examination record also showed that hair samples from two of the victim's elder brothers tested positive for morphine.

[4] Dr. Cohle noted no indication on the victim's body of a needle injection.

> I'm not trying to imply that this child had exactly two . . . 200 milligram tablets. It's possible, obviously, but because there's not good information, . . . I'm not willing to say that. I would say it's a heck of a lot of morphine, especially as far as I know considering the fact that this child should not have been given morphine at all.
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> . . . I mean, let's assume the 404 is correct. Then I guess any multiple of morphine tablets that would equal that would be capable of giving the child that level.

At defendant's sentencing, the parties voiced their positions concerning the propriety of scoring offense variables (OV's) 1, MCL 777.31 ("aggravated use of a weapon"), and 2, MCL 777.32 ("lethal potential of the weapon possessed or used"). Defendant maintained that morphine, a controlled substance, did not qualify as a weapon for purposes of either OV because "[i]t's not inherently dangerous." The prosecutor replied, "It is . . . [a chemical substance] dangerous in and of itself where it's got to be a correctly prescribed dosage and it is a harmful chemical substance that obviously can kill, as it did in this case." The trial court ruled as follows that it would score 20 points for OV 1:

> Well, the fact is, a lot of substances are dangerous if used improperly. If you swallowed Draino it could in fact end in death or serious illness. Certainly anything taken in excess would. Common aspirin is not a prescription. Those kinds of things people can take an overdose and subsequently die. The fact that there are a lot of substances out there that can kill doesn't necessarily mean they are, in and of themselves . . . products that could be used to score OV 1, put in 20.
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> But the problem as I see it, morphine is a controlled substance and it is mostly prescribed for adults. I assume, children do get it, but the fact of the matter is when you have that type of prescription and you neglect putting it in some secure place that young children cannot access—we are told to put these drugs in a secure place, lock them up, don't let children have access to them. . . . But when you leave out a morphine tablet or tablets in a location where a two year old can get at them there is not any amount of a drug of that nature that can be taken by a two year old that is not potentially dangerous.
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> And legally, in that sense, I believe OV1 can be scored 20 points because of the nature of the drug. Morphine is a prescription drug. It's certainly a powerful drug, one of the most powerful drugs we have. To just put it on the counter, a table next to a bed, you have a two year old that could take that and any amount of morphine given to a two year old is dangerous if she gets one pill. I don't know how much the child swallowed. But the fact of the matter is any amount of morphine to a two year old can be deadly. Obviously, she had a 200 times greater amount than what normally you can give a child anyway.

> So, I assume under that I would say OV . . . 1 scored 20 is properly scored. Morphine is a prescription. It can't be left around for a two year old to get. . . . A two year old taking morphine, there is nothing a two year old can do to save themselves. If they take a pill and get ill, they can't call someone. They don't know what is happening there or can't get help. I would allow OV . . . 1 to be scored 20 points under this set of circumstances.

The court then explained that it would score 15 points under OV 2:

> But on the plea of no contest on the involuntary manslaughter *I am not saying that [defendant] administered it. I don't think they are saying she administered it*, but she left it laying around where a reasonable person would not leave this. This was such a serious lapse on her part that can be considered . . . serious misconduct which rises to the level of involuntary manslaughter. *I am not saying she administered it*. I am saying that she placed it in such a place or had the morphine in a room such that a two year old could get access. The conduct was willful and gross so that's what raised it to the level of involuntary manslaughter. [Emphasis added.]

The trial court additionally rejected a defense challenge to the assignment of 10 points for bodily injury pursuant to OV 3, MCL 777.33. The court ultimately exceeded the sentencing guidelines range and imposed a term of 10 to 15 years in prison.

II

Defendant first reiterates her disputes regarding the trial court's scoring of OV 1, OV 2 and OV 3. An appellate court must affirm a sentence that falls "within the appropriate guidelines sentence range . . . absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing MCL 769.34(10). When this Court faces a sentencing guideline scoring dispute, we consider "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Endres*, 269 Mich App at 417. "We review for clear error a court's finding of facts at sentencing." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 1, MCL 777.31, assesses points for the "aggravated use of a weapon," and lists the applicable offense characteristics as follows:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
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> (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon . . . 25 points

(b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device . . . 20 points

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon . . . 15 points

(d) The victim was touched by any other type of weapon . . . 10 points

(e) A weapon was displayed or implied . . . 5 points

(f) No aggravated use of a weapon occurred . . . 0 points

The related offense variable contained in OV 2, MCL 777.32, sets forth the following offense characteristics concerning the "lethal potential of the weapon possessed or used":

(1) Offense variable 2 is lethal potential of the weapon possessed or used. Score offense variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device . . . 15 points

(b) The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon . . . 15 points

(c) The offender possessed or used a short-barreled rifle or a short-barreled shotgun . . . 10 points

(d) The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon . . . 5 points

(e) The offender possessed or used any other potentially lethal weapon . . . 1 point

(f) The offender possessed or used no weapon . . . 0 points

When construing the meaning of the statutory language comprising the sentencing guidelines, we must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "The first step in that determination is to review the language of the statute itself." *Id.* (internal quotation omitted). When ascertaining legislative intent, we read the entire act and interpret a particular word in one statutory section only "after due consideration of every other section, so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW

221 (1922). We consider both the plain meaning of critical words or phrases comprising the statute and their placement and purpose in the statutory scheme. *People v Blunt*, 282 Mich App 81, 84; 761 NW2d 427 (2009). In summary, "[w]e construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006) (internal quotation omitted).

Plainly, OV's 1 and 2 focus on the "weapon" element of a crime. If an offender employs a weapon to harm or threaten someone, a sentencing court scores points under OV 1. The more dangerous or "lethal" the weapon utilized, the higher the score demanded under OV 2. The structure of these offense variables reflects that the Legislature intended for the sentencing court to first decide whether the offender used a weapon to commit the crime before selecting an appropriate score.

Modern times have led to the development of modern weapons, such as anthrax, nuclear devices, and sarin.[5] In enacting OV's 1 and 2, our Legislature recognized that the contemporary criminal armamentarium may include sophisticated weaponry, and that the nature of today's weapons fundamentally distinguishes them from more traditional weapons like firearms, knives, brass knuckles or baseball bats. Accordingly, the Legislature identified as weapons harmful biological substances, harmful biological devices, harmful chemical substances, harmful chemical devices, harmful radioactive materials, harmful radioactive devices, incendiary devices, and explosive devices. MCL 777.31(1)(b).

In both OV 1 and OV 2, the Legislature clarified that the term "harmful chemical substance" draws its meaning from MCL 750.200h. MCL 777.31(3)(a), MCL 777.32(3)(a). Section 200h comprises a definitional statute for MCL 750.200i, which criminalizes the manufacture, delivery, possession, transport, placement, use, or release "for an unlawful purpose" of "[a] harmful chemical substance or a harmful chemical device." MCL 750.200i(1)(b). MCL 750.200h(*i*) defines a "harmful chemical substance" as a "a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants." The language of MCL 750.200h and MCL 750.200i plainly signal that the Legislature intended to specially punish those who plan or carry out terrorist acts or crimes using chemical, biological or radioactive weapons.[6]

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[5] According to the Federation of American Scientists, "Sarin is a colorless, odorless, tasteless, human-made chemical warfare agent." Sarin fact sheet, accessed May 31, 2011 <http://www.fas.org/programs/bio/factsheets/sarin.html>.

[6] We recognize that a legislative analysis "is usually not a persuasive measure of the statute's intended meaning," *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 141; 662 NW2d 758 (2003). However, we note as of interest a Michigan House Legislative Analysis stating the following:

In assigning defendant points under OV 1 and OV 2, the trial court correctly determined that morphine qualifies as a "harmful chemical substance." MCL 750.200h(*i*). However, the trial court failed to articulate that defendant had used the morphine as a weapon; to the contrary, the trial court's factual findings refute that defendant deliberately dosed her child with morphine.[7] Because the plain language of OV's 1 and 2 require use of a weapon, the first question presented was whether morphine amounted to a weapon under the circumstances of this case. In *People v Lange*, 251 Mich App 247; 650 NW2d 691 (2002), this Court considered whether a glass mug could be considered a weapon pursuant to OV 1. The defendant in *Lange* admitted that he had repeatedly struck his wife's head with a glass mug after he learned that she was seeing another man. *Id*. at 248-249. At Lange's sentencing for second-degree murder, he challenged the trial court's scoring of 10 points under OV 1. *Id*. at 252. This Court noted that Random House Webster's College Dictionary (1997) defined a "weapon" as "any instrument or device used for attack or defense in a fight or in combat." *Id*. at 257. The Court further explained:

> Applying this dictionary definition to MCL 777.31(1)(c), it is clear that ten points are to be scored when the "victim was touched by any other (instrument or device used for attack ... in a fight or in combat)." We conclude, therefore, that

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> Finally, Senate Bill 443 would criminalize and punish the unfortunately increasing likelihood that harmful biological, chemical, and radioactive substances will be used to terrorize, harm, or kill people. This would address not only the recent incident in Lansing, where a man reportedly was trying to cultivate the deadly anthrax toxin in his basement, but also situations like that faced in Japan, where an extremist sect released a deadly nerve gas in metropolitan subway stations. While nothing like the Japanese incident has occurred yet in Michigan, the use of harmful biological, chemical, or radioactive substances or devices clearly is a possibility that the law ought to address. [House Legislative Analysis, HB 4289 & SB's 97, 443, August 24, 1998, p 9.]

[7] We respectfully disagree with the dissent's contention that an appellate court may uphold a scoring decision by finding facts that the trial court specifically declined to find. "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *Osantowski*, 481 Mich at 111. Had the trial court found that the evidence preponderated in favor of defendant's deliberate or intentional infliction of morphine on the victim, it would have expressed this conclusion. Instead, the trial court found the opposite: that defendant had not administered the drug. While we understand and appreciate the dissent's visceral reaction to the facts of this case, the Legislature surely intended that trial courts adhere closely to the statutory language. Our de novo review of the trial court's interpretation of the sentencing guidelines reveals that the trial court neglected to apply the "weapon" aspect inherent in OV 1 and OV 2. Given that the trial court specifically found as a fact that defendant left the morphine tablets in a place accessible to the victim rather than administering the drug, it erred by scoring OV 1 and OV 2. Because the trial court, not this Court, functions as the fact finder, we respectfully reject that the dissent's argument that this Court may disregard the trial court's expressed factual conclusions to search out any record evidence that might uphold a legally incorrect score.

> the term "weapon," whether through acquiescence in judicial interpretation or as accorded its plain, common, everyday meaning, is applicable to a glass mug that is used as a weapon, and that the trial court properly assessed ten points to defendant under offense variable 1, MCL 777.31(1)(c). [*Id.*]

See also 94 CJS Weapons § 1 ("A weapon is an instrument of offensive or defensive combat, or anything used, or designed to be used, in destroying, defeating, or injuring an enemy.").

In this case, the facts as found by the trial court do not suggest that defendant used morphine as a weapon to attack her daughter. Indisputably, defendant behaved in a grossly negligent or reckless manner. But neither the levels of morphine found in the hair of the victim and her siblings, nor expert opinion that the victim probably could not have swallowed a whole morphine pill, suffices to transform the morphine into "an instrument or device used for attack." Morphine does come within the statutory definition of a "harmful chemical substance." However, OV 1 and OV 2 focus on weaponry, and under the circumstances of this case morphine does not fit the definition of a weapon. Consequently, we conclude that the proper score for both variables is zero.

Defendant further challenges the trial court's calculation of 10 points under OV 3 on the ground that the victim endured a "[b]odily injury requiring medical treatment." MCL 777.33(1)(d). Although OV 3 contemplates for a scoring of up to 100 points when a victim dies, this score only applies if "homicide is not the sentencing offense." MCL 777.33(2)(b). In *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005), an OV 3 scoring dispute in the context of a second-degree murder conviction, our Supreme Court summarized its holding as follows:

> The defendant not only killed the victim, but in the process also caused a physical injury—a gunshot wound to the head. Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: "Life threatening or permanent incapacitating injury." This conclusion is mandated by the fact that the statute governing OV 3 requires that trial courts assess the highest number of points possible.

Here, the trial court correctly assigned 10 points for OV 3, MCL 777.33(1)(d). The victim's morphine overdose amounted to a bodily injury, and the author of the presentence information report asserted at the sentencing hearing that "the ambulance personnel attempted to save this young girl. She did receive medical treatment in order to try and save her and in fact [defendant] performed CPR before the ambulance personnel got to the scene there."

The trial court calculated defendant's prior record variable (PRV) total at 4 points and her OV's at 110 points, in the B-VI grid for the class C offense. MCL 777.64. The subtraction of the 35 points that the trial court improperly scored for OV 1 and OV 2 still leaves defendant in the B-VI grid, with a minimum guideline range of 36 to 71 months. Therefore, resentencing is not warranted on the basis of the trial court's erroneous scorings of OV 1 and OV 2.

III

Defendant lastly criticizes as disproportionate her minimum sentence of 10 years' imprisonment. The trial court's guidelines scoring placed defendant's minimum sentence range between 36 and 71 months. MCL 777.64. The trial court departed from the minimum guidelines sentence range and instead sentenced defendant to a minimum of 10 years' imprisonment.

We agree that the trial court articulated substantial and compelling reasons justifying a departure sentence. "However, the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) (emphasis in original). In *Smith*, the Supreme Court cautioned that

> if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id*. at 304.]

The trial court's articulation must include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id*. at 311.

The trial court failed to offer an explanation for its decision to impose a minimum sentence of 10 years. Although the trial court detailed substantial and compelling reasons warranting a departure, it neglected to offer any explanation "why the substantial and compelling … reasons articulated justify" the particular 10-year sentence imposed. *Smith*, 482 Mich at 318. The sentencing guidelines envision that the top of defendant's minimum sentence range equaled 71 months, one month less than six years' imprisonment. MCL 777.64. The 10-year minimum term imposed by the trial court substantially exceeded the statutory minimum guidelines range, and entered a sentencing realm that the Legislature reserved for the most hardened criminals convicted of Class C offenses. "[T]he Legislature's purposes in enacting the sentencing guidelines—in particular the attainment of reasonably uniform and proportionate criminal sentences—can only be achieved if the guidelines are understood to mean what they say." *Smith*, 482 Mich at 319-320 (Markman, J., concurring). Because the trial court failed to articulate a

basis for the extent of the departure it imposed, independent of the reasons invoked in support of the departure, the trial court must resentence defendant.[8]

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

[8] The dissent asserts that the trial court properly articulated reasons for imposing the sentence it selected by invoking the two-thirds rule, "and it did so on the basis of the sheer egregiousness of the situation." *Post* at 10. But the invocation of "egregious" facts, standing alone, does not serve to "justify the *particular* departure in a case." *Smith*, 482 Mich at 304 (emphasis in original, internal quotation omitted). The dreadful facts recited by the dissent do not substitute for an independent explanation of "why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.*